STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2003
v DAVID A. CHERRY, Defendant-Appellant.	No. 232027 Genesee Circuit Court LC No. 00-005551-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JAMES PRESCOTT BURTON, Defendant-Appellant.	No. 232029 Genesee Circuit Court LC No. 00-005549-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DANIEL JAY BARRON, Defendant-Appellant.	No. 232284 Genesee Circuit Court LC No. 00-005547-FC

Before: Whitbeck, C.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a trial in which defendants were tried together before separate juries, defendant David A. Cherry was convicted of first-degree home invasion, MCL 750.110a(2), first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, and safe-

breaking, MCL 750.531. The trial court sentenced him to six to twenty years' imprisonment for the first-degree home invasion conviction, life in prison for the first-degree felony murder conviction, life in prison for the second-degree murder conviction, and life in prison for the safe-breaking conviction. Another jury convicted James Prescott Burton of first-degree home invasion, MCL 750.110a(2), first-degree felony murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), safe-breaking, MCL 750.531, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to fourteen to twenty-four months' imprisonment for the first-degree home invasion conviction, life in prison for the first-degree felony murder conviction, life in prison for the first-degree murder conviction, life in prison for the safe-breaking conviction, and two years' imprisonment for the felony-firearm conviction. A final jury convicted Daniel Jay Barron of first-degree home invasion, MCL 750.110a(2), first-degree felony murder, MCL 750.316(1)(b), and second-degree murder, MCL 750.317. The trial court sentenced him to fourteen to twenty-four months' imprisonment for the first-degree home invasion conviction, life in prison for the first-degree felony murder conviction, and life in prison for the second-degree murder conviction. Defendants appeal as of right. On September 21, 2001, this Court entered an order consolidating defendants' appeals. *People v Cherry*, unpublished order of the Court of Appeals, entered 9/21/01 (Docket Nos. 232027, 232029, and 232284). We affirm in part, reverse in part, and remand.

I. Factual History

On December 11, 1999, defendants broke into a house for the purpose of robbing it. Inside the house, they encountered the victim, whom they held down and beat with their fists and a piece of a hockey stick that Burton had brought with him. While one or two defendants guarded the victim, the other defendant or defendants ransacked the house and discovered knives and guns owned by the victim. At one point, when the victim attempted to fight defendants, he was beaten and stabbed several times with a knife. Finally, the victim was shot in the head from close range and died. The night of the murder, Barron was seen covered in blood and acting incoherently and Burton was seen wearing blood-stained clothes and carrying a gun and a knife. Days after the murder, defendants separately turned themselves in to police and admitted being part of the robbery. All three defendants admitted to going to the house for the purpose of robbing it, but had conflicting stories about who beat, stabbed, and shot the victim. None of defendants admitted to personally stabbing or shooting the victim or having an intent to kill the night of the murder. DNA tests revealed that items linked to each defendant was covered in the victim's blood.

II. Analysis

A. Sufficiency of the Evidence

Cherry and Barron argue that the prosecution did not introduce sufficient evidence to support their felony murder convictions. Due process requires that the prosecution introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). Therefore, by arguing that the evidence was insufficient to sustain their convictions, defendants invoke their constitutional rights to due process of law. *Hawkins, supra*, 245 Mich App 457. Review of this constitutional issue is de novo. *Id.*

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). A reviewing court must make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecution need not negate every reasonable theory consistent with innocence, but need only convince the jury of the defendant's guilt in the face of whatever contradictory evidence the defendant may provide. *Id.* All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

1. Cherry's Felony Murder Conviction

At trial, the prosecution argued that Cherry committed felony murder as a principal or an aider and abettor.

> The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including (first-degree home invasion)]. [*Nowack, supra* at 401, quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).]

To convict a defendant of felony murder as an aider and abettor, the prosecution must prove:

> (1) the crime charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave the aid and encouragement. An aider and abettor must have the same requisite intent as that required of a principal. Thus, "the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or cause great bodily harm, or had wantonly and willfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm." [*People v Tanner*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 231966, issued 2/18/03), slip op at 24 (citations omitted).]

Cherry does not dispute that there was sufficient evidence to convict him of first-degree home invasion. He also does not dispute that there was sufficient evidence to show that one of the other defendants committed felony murder by killing the victim. Instead, Cherry argues that there was insufficient evidence to support his conviction for felony murder because there was no evidence that he had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. We disagree. "The facts and circumstances of the killing may give rise to an inference of malice. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Nowack, supra* at 401, quoting *Carines, supra* at 759.

> In situations involving the vicarious liability of cofelons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for an unforeseen death that did not result from actions agreed upon by the participants. In cases where the felons are acting intentionally or recklessly in pursuit of a common plan, liability may be established on agency principles. If the homicide is not within the scope of the main purpose of the conspiracy, those not participating are not criminally liable. [*Carines, supra* at 759, quoting *People v Turner*, 213 Mich App 558, 566-567; 540 NW2d 728 (1995), overruled on other grounds *People v Mass*, 464 Mich 615, 627-628 (2001).]

In the present case, Cherry admitted to police that he went to the victim's house with the intention of breaking in and robbing it. Cherry knew that Burton was carrying a broken hockey stick and knew that there was a possibility that the victim was home and would have to be subdued. When defendants went inside the house, the victim hit Cherry on the head and Cherry hit him back. Cherry then fell on the victim's legs and held him down while either Burton or Barron hit the victim with the hockey stick over and over again on his head, ribs, shoulders, and upper body. During the next forty-five minutes, Cherry continued to hold the victim down while Burton and Barron intermittently beat the victim. As they beat the victim, somebody told him that he would be okay if he told them the location of his safe or the combination to his safe. The victim pleaded for his life, but refused to give defendants any information. At one point, Cherry saw Burton with a gun and heard Burton tell Barron to get a gun to back him up. Finally, the victim attempted to fight back against Cherry. Cherry tackled the victim and punched him a few times. Cherry slid down on the victim's body and Burton stabbed the victim three times, once in the neck. Later, as Cherry was leaving, he heard a gunshot and saw Burton standing over the victim with a gun in his hand. A pathology expert testified that, even if the victim had not been shot, he would have died of blood loss from the other wounds without medical attention.

The essential question is whether Cherry participated in the home invasion with knowledge that Burton intended to kill or cause great bodily harm so as to permit a rational trier of fact to conclude that Cherry acted with wanton and willful disregard sufficient to support a finding of malice. See *Turner, supra* at 572. In *Turner, supra* at 572, this Court determined that a defendant's knowledge that his cofelon was armed during the commission of a robbery is enough for a rational trier of fact to find that the defendant, as an aider and abettor, participated in the crime with knowledge of the principal's intent to cause great bodily harm. In the present case, Cherry actually held the victim down while he was beaten with a hockey stick and tackled the victim just before Burton stabbed him with a knife. Cherry saw Burton carrying a gun in the house and heard the gunshot. Under these circumstances, we conclude that Cherry knew of Burton or Barron's intent to at least cause great bodily harm. Therefore, a rational factfinder could find that Cherry was acting with wanton and willful disregard for the likelihood that the natural tendency of this behavior would cause death or great bodily harm. The evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that Cherry was guilty of felony murder.

2. Barron's Felony Murder Conviction

Barron also argues that there was insufficient evidence for the jury to convict him of felony murder. We disagree. Barron admitted in his statement to police that he went to the

victim's house with the intention of breaking in and robbing it. Barron knew that Burton was carrying a broken hockey stick when defendants went to the house. When defendants went inside the house, the victim ran at the front door and Burton hit him in the head with the hockey stick. Barron and Cherry held the victim down while Burton hit him about five times with a lot of force with the hockey stick. Barron saw Burton hit the victim on the head with the hockey stick. Barron admitted that he kicked the victim. The victim then grabbed an object and threw it at Barron. Cherry tackled the victim and subdued him. When Barron and Burton went to search the house, Burton found a gun and took it. When they went back downstairs, Barron saw that the victim was lying on his back. Cherry told Burton that the victim was not moving. When Cherry and Burton went into the basement, Barron ran out of the house. Barron's glove, sock, and pants were stained with large amounts of the victim's blood.

Several days after the murder, a witness overheard Barron say that he had just killed somebody and would do it again. The witness called 911 and told police that Barron said that "he had shot the dude in the back of the head." The witness told police that Barron had said that he was going to rob a guy, but shot him with a shotgun because the guy "got smart with him" and would not give up the items he was going to steal. The witness further told police that Barron had stated that he and others had beat a man up and had shot him. Barron bragged that he was not afraid to do it again.

Under these circumstances, we conclude that the evidence was sufficient to show that Barron either killed the victim himself or at least knew of Burton or Cherry's intent to at least cause great bodily harm. A rational factfinder could find that Barron killed the victim or was acting with wanton and willful disregard for the likelihood that the natural tendency of this behavior would cause death or great bodily harm. Barron admitted that he held the victim down while Burton beat him with a hockey stick. Barron saw Burton take one of the victim's guns. In his statement to police, Barron did not mention whether he was present when Burton stabbed or shot the victim. However, Burton was seen after the killing covered in the victim's blood. A witness heard Barron saying after the killing that he shot the victim in the head. In reviewing the sufficiency of the evidence, a reviewing court must draw all reasonable inferences and make credibility choices in support of the jury verdict. *Nowack*, *supra* at 400. The witness' testimony shows that Barron killed the victim or at least knew that the victim was killed and how he was killed. Given this testimony and the evidence that Barron was covered in the victim's blood and was present for much of what occurred at the house, it would be reasonable for the jury to infer that Barron shot the victim or was at least present when the victim was stabbed or shot. If Barron did not shoot the victim, it would be reasonable for the jury to infer from the circumstances that Barron knew of Burton or Cherry's intent to at least cause great bodily harm. The evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that Barron was guilty of felony murder.

B. Double Jeopardy

Next, defendants raise several double jeopardy issues. Both the United States and the Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001); *People v Barber*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 233315, issued 2/7/03), slip op at 3. The Double Jeopardy Clause of the Fifth Amendment

protects against multiple punishments for the same offense and multiple prosecutions for the same offense. *Herron, supra* at 599; *Barber, supra*, slip op at 3. A double jeopardy challenge presents a question of law that is reviewed de novo on appeal. *Herron, supra* at 599.

1. Felony Murder and First-Degree Home Invasion Convictions

Defendants first argue that their convictions for both felony murder and first-degree home invasion, as the predicate felony for their felony murder convictions, violated the prohibition against double jeopardy. We agree. In *People v Wilson*, 242 Mich App 350, 360; 619 NW2d 413 (2000), this Court explained:

> Convictions of both felony murder and the underlying felony offend double jeopardy protections. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). When a defendant is erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony. *Id.* at 259-260. [*Wilson, supra* at 360, quoting *People v Warren*, 228 Mich App 336, 254-355; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000).]

In the present case, defendants were convicted of felony murder and first-degree home invasion as the predicate underlying felony to the felony murder conviction. Therefore, defendants' convictions and sentences for first-degree home invasion must be vacated.

2. Felony Murder and First-Degree or Second-Degree Murder Convictions

Second, defendants argue that their convictions for both felony murder and first-degree murder (Burton) or second-degree murder (Cherry and Barron) violated the prohibition against double jeopardy. "Multiple murder convictions arising from the death of a single victim violate double jeopardy." *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). In regard to Cherry and Barron's convictions for both first-degree felony murder and second-degree murder, this Court has held that a defendant cannot be convicted of both first-degree murder and second-degree murder for the death of a single victim. *Id.* The prosecution concedes this argument. The remedy for such a double jeopardy violation is to vacate the defendant's second-degree murder conviction. *Id.* at 429-430. Therefore, we vacate Cherry and Barron's second-degree murder convictions and sentences.

In regard to Burton's conviction for both felony murder and first-degree murder, this Court has held that "[w]here dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy." *Coomer, supra* at 224, citing *People v Bigelow*, 225 Mich App 806, 806-808; 571 NW2d 520 (1997), vacated 225 Mich App 806 (1997), reinstated in part 229 Mich App 218, 220; 581 NW2d 744 (1998). The prosecution also concedes this argument. "The proper remedy is to modify the judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." *Coomer, supra* at 224. Therefore, we remand to the trial court to modify Burton's judgment of sentence to specify that his conviction is for one count and one sentence of first-degree murder supported by two theories.

C. Admissibility of Autopsy Photograph

Next, Burton argues that the trial court erred in admitting an autopsy photograph into evidence because the photograph was not relevant and was unfairly prejudicial. Burton argues that the photograph was not relevant because the only disputed issue was the identity of the person who beat, stabbed, and shot Coward. We disagree. A trial court's decision regarding the admissibility of photographs into evidence is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). "An abuse of discretion occurs when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002).[1]

> Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). [*Taylor, supra* at 521-522.]

Burton was charged with first-degree murder. Therefore, the degree of harm intended was an issue in the case. MCL 750.316(1)(a); *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Evidence of injury is admissible to show intent to kill. *Id.* Additionally, the nature and extent of the injuries are relevant to intent to kill. *Id.* The photograph at issue showed the victim's bruised and punctured arm and hand. The nature of these injuries demonstrates that there might have been a struggle before the victim was killed. The photograph of these injuries is probative of defendants' actions before the victim was killed and is relevant to defendants' intent. Burton does not deny breaking into the victim's house the night of the murder, but denies that he was involved in the killing. However, evidence introduced at trial showed that after the murder, Burton stated that he killed the victim. The evidence shows that Burton later went to Michael Eagan's house covered in the victim's blood and left a knife, gloves, and bandana covered in the victim's blood at Eagan's house. If the jury believed that Burton was involved in the killing, it had to determine whether Burton intended to kill and whether the murder was premeditated. Therefore, not only was Burton's involvement in the killing an issue in the case, but, if the jury believed that he was involved, his intent to kill was an issue. The photograph was relevant to establishing Burton's intent.[2]

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[1] Burton argues that a de novo standard of review should be applied because his constitutional rights to due process and a fair trial are implicated. However, not every trial error violates due process. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). Further, defendant did not object on the basis of an alleged due process violation in the trial court and, therefore, did not preserve such a claim for appeal, *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996), nor has he demonstrated a plain error of constitutional magnitude, *Carines, supra* at 774. Accordingly, this writer opines that the panel should not depart from the traditional standard applicable to review of evidentiary issues. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[2] Additionally, photographs may be used to corroborate a witness' testimony. *Mills, supra* at 76. In this case, the photograph may also have been relevant for the purpose of corroborating
(continued…)

Burton also argues that, even if the photograph was relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

> Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin, supra* at 58. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). A trial court has broad discretion in regard to controlling trial proceedings. MCL 768.29. [*Taylor, supra* at 521-522.]

Admission of gruesome photographs solely for the purpose of arousing the sympathies or prejudices of the jury may be error requiring reversal. *Ho, supra* at 188. However, gruesomeness alone is not grounds for exclusion. *Mills, supra* at 76. A photograph that is otherwise admissible for some proper purpose is not inadmissible because of its gruesome details or the shocking nature of the crime. *Ho, supra* at 188.

We conclude that the relevancy of the photograph was not substantially outweighed by the danger of unfair prejudice. As discussed, the photograph was probative of what happened the night of the murder and helped demonstrate defendants' intent. The photograph at issue was the only autopsy photograph admitted out of forty-one photographs. Although it may have been gruesome, the photograph only showed the victim's arm and hand. The photograph did not show the wounds on the victim's head, neck, body, or other areas that might shock the jury more than a photograph of his arm and hand. Additionally, the victim's arm and hand had been cleaned of blood before the photograph was taken. Rather than admitting other, more gruesome, photographs, the trial court admitted only the photograph at issue in order to help the jury with the proper determination of defendants' intent. The photograph was an accurate factual representation and did not present an enhanced or altered representation of the victim's injuries. See *Mills, supra* at 77-78. The probative value of the photograph was not substantially outweighed by the danger of unfair prejudice and the trial court did not abuse its discretion in admitting it into evidence.

D. Ineffective Assistance of Barron's Counsel

Next, Barron argues that he was denied the effective assistance of counsel for several reasons. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of

(…continued)

Krznarich's testimony.

counsel." *Sabin, supra* at 659. In the present case, Barron failed to move in the trial court for an evidentiary hearing or a new trial. Therefore, this Court's review is limited to the facts on the existing record. *Id.*

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms and (2) the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Under the first prong of the test, the alleged errors must be so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and defendant bears the heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. Under the prejudice prong, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

1. Motion to Quash Information

First, Barron argues that his counsel was ineffective for failing to file a motion to quash where the district court amended the charges against Barron based on evidence admissible only against Cherry and Burton. However, Barron does not argue which inadmissible evidence the district court relied on in binding him over, why this evidence was inadmissible, or why counsel was ineffective for failing to move to quash the information based on the consideration of this evidence.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Issues that are insufficiently briefed are considered abandoned on appeal. *Kevorkian, supra* at 389. Barron abandoned this argument by failing to sufficiently brief it in his appellate brief.

Barron also argues that his counsel was ineffective for failing to file a motion to quash where the prosecution failed to provide evidence proving each element of the charges. Barron

does not argue which elements of which charges the prosecution failed to prove, but merely argues in general terms that the prosecution failed to provide evidence of *all* of the elements of *all* of the charges. Barron has also abandoned this argument by insufficiently briefing it in his appellate brief. *Kevorkian, supra* at 389. Nonetheless, any error in the sufficiency of proofs at the preliminary examination is considered harmless where the prosecution presented sufficient evidence at trial to convict the defendant. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). As discussed, *supra*, there was sufficient evidence at trial to convict Barron of felony murder. Barron does not dispute that the prosecution presented sufficient evidence at trial to convict him of second-degree murder and first-degree home invasion. Therefore, even if the magistrate erroneously concluded that there was sufficient evidence produced at the preliminary examination, such error was harmless.

2. Objections to Evidence and Testimony

Next, Barron argues that his trial counsel was ineffective for failing to object to the admission of various pieces of evidence and the testimony of various witnesses. Barron argues that his trial counsel was ineffective for failing to object to the admission of over thirty testimonial statements. Barron also argues that his trial counsel should have objected to seven of the witnesses who testified before his jury. Barron argues that this evidence was inadmissible because it related to the actions and guilt of Cherry and Burton and was not relevant to the case against him.

> Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). [*Taylor, supra* at 521-522.]

We conclude that the evidence concerning Cherry and Burton's actions was necessary to give the jury an intelligible presentation of the full context in which the disputed events took place. See *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The prosecution's theory at trial was that Barron aided and abetted Cherry and Burton in the commission of the crimes. A person who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39[3]; *Turner, supra* at 568. Because Barron was involved in the crime with Cherry and Burton, it was necessary for the jury to understand Cherry and Burton's actions in order to determine if Barron aided and abetted those actions. Some of the evidence concerning Cherry and Burton's actions is also

[3] The aiding and abetting statute provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39.]

circumstantial evidence regarding Barron's involvement. "Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Turner, supra* at 567. Therefore, the evidence concerning Cherry and Burton's involvement in the crime was relevant. Furthermore, even if this evidence was inadmissible, Barron does not argue how the result of the proceedings would have been different had this evidence been excluded. Accordingly, Barron's trial counsel was not ineffective for failing to object to the admission of the evidence concerning Cherry and Burton's involvement in the crime or Barron's jury's presence before witnesses who testified regarding Cherry and Burton's involvement in the crime.

Barron also argues that his trial counsel should have objected to the admission of this evidence because its probative value was outweighed by the danger of unfair prejudice and it should have been excluded under MRE 403. Barron argues that prejudice is presumed because the evidence does not relate to his guilt, but only relates to Cherry and Barron's guilt. However, as explained by our Supreme Court in *Mills, supra* at 75, "[a]ll evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." (Emphasis in original.) Unfair prejudice refers to the tendency of the evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger, or shock. *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). As discussed, the evidence and testimony at issue was relevant to the issues in Barron's case. Barron merely argues that the evidence at issue was unfairly prejudicial because it was not relevant. He does not argue that the evidence was unfairly prejudicial in any other way. Furthermore, even if this evidence was inadmissible, Barron does not argue how the result of the proceedings would have been different had this evidence been excluded. Therefore, Barron's trial counsel was not ineffective for failing to object to the admission of this evidence on MRE 403 grounds.

Next, Barron argues that his trial counsel was ineffective for failing to object to the admission of the autopsy photograph. However, Barron's trial counsel *did* in fact object to the admission of the autopsy photograph. Therefore, Barron's argument should fail. Furthermore, as discussed, *supra*, the trial court did not abuse its discretion in admitting the autopsy photograph.

3. Jury Instructions

Next, Barron argues that his trial counsel was ineffective for failing to request a jury instruction based on MRE 105, informing the jury that the evidence admitted concerning Cherry and Burton was not admissible in regard to him. However, as discussed, *supra*, the evidence concerning Cherry and Burton's actions and involvement in the crime was relevant and admissible. Therefore, an instruction for the jury not to consider this evidence would not be appropriate. A defense attorney is not required to bring a motion that has no merit. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Furthermore, Barron fails to argue how the outcome of the case would have been different if this instruction would have been given to the jury. Therefore, Barron's trial counsel was not ineffective for failing to request an instruction informing the jury that the evidence admitted concerning Cherry and Burton was not admissible in regard to him.

Barron also argues that his trial counsel was ineffective for failing to ensure that the trial court gave an instruction telling the jury that the evidence that Barron was in a gang was not evidence of his guilt. However, as discussed, *infra*, although the trial court never gave an instruction *specifically* telling the jury to disregard evidence that Barron was in a gang, the instruction given by the trial court was sufficient to inform the jury not to consider such evidence when determining his guilt. Furthermore, Barron does not argue how the outcome of the trial would have been different if the trial court would have specifically mentioned "gang evidence" in its instruction. Therefore, Barron's trial counsel was not ineffective for failing to ensure that the trial court specifically referenced "gang evidence" in its jury instructions.

4. Motion for a New Trial

Next, Barron argues that his trial counsel was ineffective for failing to file a motion for a new trial. The trial court may order a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B).

Barron first argues that his trial counsel was ineffective for failing to move for a new trial regarding "all . . . issues in Defendant[']s Brief and Supplemental Brief [(excluding the ineffective assistance of counsel issues).] Barron does not elaborate on this argument. This issue was not sufficiently argued or briefed and is abandoned. *Kevorkian, supra* at 389.

Barron also argues that his trial counsel was ineffective for failing to move for a new trial because of jury confusion, as evidenced by its verdict of guilty of second-degree murder and felony murder. Barron was charged with felony-murder and first-degree premeditated murder. The trial court gave the jury instructions regarding felony murder, first-degree premeditated murder, and the lesser included offense of second-degree murder. The jury followed these instructions and found Barron guilty of felony murder and second-degree murder. As discussed, *supra*, Barron's protections against double jeopardy were violated when he was convicted of both felony murder and second-degree murder. Therefore, his conviction for second-degree murder should be vacated. However, the jury did not disregard the trial court's instructions and there is no evidence that they were confused. Furthermore, Barron does not argue how any juror confusion would have changed the outcome of the verdict. Therefore, Barron's trial counsel was not ineffective for failing to move for a new trial on the grounds of juror confusion.

E. Barron's Motion for a New Trial

Next, Barron argues that the trial court abused its discretion in denying his motion for a separate trial. "Whether to hold separate trials is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent an abuse of that discretion." *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993); see also MCL 768.5. A defendant does not have an absolute right to a separate trial. *Harris, supra* at 152. "A strong policy favors joint trials in the interest of justice, judicial economy, and administration." *Id*. The trial court must sever the trial of multiple defendants on related offenses on a showing that severance is necessary to avoid prejudice to a defendant's substantial rights. MCR 6.121(C). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended in part on reh sub noms

People v Rode and *People v Gallina*, 447 Mich 1203 (1994). The defendants' defenses must be not only inconsistent, but must be antagonistic, mutually exclusive, or irreconcilable. *Id.* at 343-350.

In the present case, the trial court denied Barron's motion for a separate trial, but gave each defendant a separate jury. "The dual-jury procedure is a partial form of severance, to be evaluated under the standard applicable to motions for separate trials. The issue is whether there was prejudice to substantial rights after the dual-jury system was employed." *Hana, supra* at 359. Barron argues that the trial court abused its discretion in denying his motion for severance because evidence was admitted before his jury that was only admissible against Cherry and Burton. However, "a fair trial does not include the right to exclude relevant and competent evidence." *Id.* at 362, quoting *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993). In the trial in this case, several witnesses testified outside the presence of Barron's jury and evidence that was not admissible against Barron was admitted outside of the presence of Barron's jury. As discussed, *supra*, the evidence and testimony admitted in front of Barron's jury at the trial would have been admissible at Barron's separate trial. None of the evidence admitted before Barron's jury was probative of Barron's guilt but technically admissible only against Cherry or Burton. *Id.* at 539; *Hana, supra* at 362. Additionally, Barron was not barred from presenting " 'essentially exculpatory evidence that would be available to a defendant tried alone, but unavailable in a joint trial.' " *Id.*, quoting *Zafiro, supra* at 539.

Furthermore, defendants did not present antagonistic, mutually exclusive defenses. The prosecution argued at trial that Barron could be found guilty as a principal or an aider and abettor. This argument reduced the risk of prejudice from the joint trial. *Hana, supra* at 360. Additionally, "[f]inger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses." *Id.* at 360-361. Therefore, the fact that defendants all admitted that they broke into Coward's house, but blamed each other for the killing does not mean that their defenses were mutually exclusive. The properly instructed jury could have found all three defendants similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal. *Id.* at 361.

Finally, Barron does not argue how he was prejudiced by his jury being exposed to the admission of this evidence and testimony at the joint trial. Additionally, the trial court reduced any prejudice by instructing the jury as follows: "The fact that [defendants] have been on trial at the same time but with separate juries is not evidence that they were associated with each other or that any one of them is guilty." Therefore, we conclude that the trial court did not abuse its discretion in failing to grant Barron's motion for separate trials.

F. Barron's Right to Counsel

Next, Barron argues that the trial court abused its discretion by failing to appoint him substitute counsel. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). This Court has explained when the substitution of counsel is appropriate:

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute

> counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Traylor, supra* at 462, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

Barron argues that the trial court abused its discretion by failing to appoint substitute counsel or at least inquire into his problem with his trial counsel. However, Barron does not give any reason why he was entitled to substitute counsel or why he even wanted substitute counsel. " 'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.' " *Traylor, supra* at 464, quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Furthermore, the substitution of counsel on the day of the trial would have significantly disrupted the judicial process by requiring an adjournment of the trial of all three defendants in order to permit Barron's new counsel to become familiar with the case. *People v Johnson*, 144 Mich App 125, 135; 373 NW2d 263 (1985). Finally, Barron does not argue how he was prejudiced by the trial court's denial of his request for substitute counsel. *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985). Therefore, the trial court did not abuse its discretion in denying Barron's request for substitute counsel.

G. Jury Instructions

Next, Barron raises several claims of instructional error. Claims of instructional error are reviewed de novo on appeal. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). "A trial court is required to instruct the jury on the law applicable to the case and to present the case to the jury in a clear and understandable manner." *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions are reviewed in their entirety rather than extracted piecemeal to establish error. *Aldrich, supra* at 124. "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "When a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge. . . . A trial court is required to give a requested instruction, except where the theory is not supported by evidence." *People v Lemons*, 454 Mich 234, 245 n 14; 562 NW2d 447 (1997). "Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *Id.*

1. Abandonment Instruction

Barron argues that the trial court erred in denying his request to give a jury instruction regarding abandonment. Barron contends that he was entitled to an abandonment instruction because the theory of his case was that he abandoned the crime before it was committed. "Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose." *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). The defense of abandonment is not available where the defendant fails to complete the crime because of unanticipated difficulties, unexpected resistance, or circumstances that increase the probability of getting caught. *Id.*

> Abandonment by the defendant is "voluntary" when it is the result of repentance or a genuine change of heart. On the other hand, the defendant is not entitled to the defense if her motivation for withdrawal was that she feared arrest, realized that she lacked an essential instrumentality to complete the crime or for some other reason could not successfully proceed, or it she merely postponed her criminal endeavor until a better opportunity presented itself. [*Id.* at 206-207, quoting Dressler, Understanding Criminal Law, § 27.08, p 356.]

We conclude that the trial court did not err in refusing Barron's request for an abandonment instruction because there is no evidence that Barron abandoned commission of the crimes before they were committed. Barron admitted to police that he broke into the victim's house to rob him. He admitted kicking the victim and holding him down while Burton hit him with a hockey stick. Later, when the victim threw an object at Barron, Barron watched as Cherry tackled him and beat him until "he pretty much looked like he was down." Barron stated that he searched the house for valuables while Cherry stood guard. After searching the house, Barron saw the victim lying on his back on the ground. Barron stated that he heard Cherry tell Burton that the victim was no longer moving. Barron left the scene after Cherry and Burton went into the basement. The day after the murder, Barron called Burton and asked for his cut of the money they had stolen. Burton was later heard telling somebody that he had recently beat and robbed a man and shot him in the head.

This evidence only shows that Barron abandoned the scene of the crime before Cherry and Burton. There is no evidence that he completely abandoned his criminal purpose before the crimes were committed. There is no evidence concerning whether the victim was stabbed and shot while Barron was in the house or after Barron left. The evidence only shows that the victim was lying on the floor unmoving when Barron left the house and that Barron had excessive amounts of the victim's blood on his clothes after he left the house. Abandonment of a crime scene after the crime has been committed does not warrant an abandonment instruction. Additionally, Barron does not argue how he was prejudiced by the trial court's refusal to give an abandonment instruction. Therefore, the evidence submitted at trial does not support an instruction for abandonment and the trial court did not err in refusing to give this instruction.

2. Instruction Regarding Evidence of Gang Involvement

Barron also argues that the trial court erred in failing to instruct the jury to disregard evidence of his gang involvement. Evidence of gang affiliation is not admissible where there is no connection between the gang affiliation and the defendant's conduct. *People v Wells*, 102 Mich App 122, 128-129; 302 NW2d 196 (1980). In this case, Barron's trial counsel agreed to allow the admission of evidence that Barron was in a gang, provided the trial court gave the jury an instruction that this evidence should not be considered evidence of his guilt. The trial court never gave an instruction *specifically* telling the jury to disregard evidence that Barron was in a gang. However, the trial court gave a more general instruction about the consideration of other bad acts as evidence:

> Members of the jury, during the course of the trial you may have heard evidence that tends to show that a defendant in the case committed other criminal behavior or improper acts for which he is not on trial, for example, [he] may have used drugs or alcohol or had warrants outstanding. Based on this evidence you

> must not decide that it shows the defendant is a bad person or that he is likely to commit crimes. You must not convict a defendant here because you think he is guilty of other bad conduct.

This instruction was sufficient to inform the jury not to consider evidence that Barron was in a gang when determining his guilt. Additionally, Barron does not argue how he was prejudiced by the trial court's instruction. Therefore, the trial court did not err in failing to instruct the jury to specifically exclude its consideration of evidence of gang affiliation when it instructed the jury not to convict defendants based on other bad conduct.

H. Cumulative Effect

Barron argues that he was denied a fair trial by the cumulative effect of the trial court's errors at trial. "Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal." *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). The only prejudicial error that occurred in the present case was a violation of defendants' double jeopardy rights. As discussed, *supra*, we order defendants' convictions and sentences in violation of their double jeopardy protections to be vacated. However, we conclude that there were no other errors in the trial. Where there are no palpable errors on any one issue, this Court may not find a cumulative effect of several errors. *Id.* at 473.

I. Sentencing

1. Cherry's Safe-Breaking Sentence

Cherry argues that the trial court failed to consider the appropriate factors in imposing his sentence and that his sentence of life in prison for his safe-breaking conviction was disproportionately high. "This Court reviews claims of disproportionality for an abuse of discretion." *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). The principle of proportionality can be considered concerning the extent of a departure from the guidelines. *People v Babcock* (*Babcock II*), 250 Mich App 463, 468-469; 648 NW2d 221 (2002), lv gtd 467 Mich 872 (2002). A defendant's sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 657; 461 NW2d 1 (1990); *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). The "key test" of proportionality is whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Relevant factors the trial court may consider in imposing the defendant's sentence include, *inter alia*, the defendant's behavior after arrest and while in custody, the defendant's remorse for committing the crime, and the defendant's potential for rehabilitation. *Id.* at 323. The factors the trial court considers in imposing the defendant's sentence should be balanced with the following objectives: "(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses." *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). A departure from the guidelines is an indication of a possibility that the sentence is disproportionate. *Bennett, supra* at 515-516.

In the present case, the legislative sentencing guidelines range for Cherry's safe-breaking conviction was forty-three to eighty-six months' imprisonment. The trial court departed upward

from the guidelines and sentenced Cherry to life in prison. This was the maximum sentence allowed by the Legislature. MCL 750.531. The maximum sentence decreed by the Legislature may be lawfully imposed, without violating the principle of proportionality, in cases involving the most serious class of offenses. *People v Merriweather*, 447 Mich 799, 806; 527 NW2d 460 (1994). Generally, the trial court does not abuse its discretion in imposing the maximum possible sentence in the face of compelling aggravating factors, but abuses its discretion in imposing the maximum sentence in the face of compelling mitigating circumstances. *Id.* at 807. It is rare that the circumstances of a case warrant a trial court imposing the maximum sentence with respect to a defendant with no prior criminal record, but such circumstances do exist. *People v Granderson*, 212 Mich App 673, 681; 538 NW2d 471 (1995).

In the present case, Cherry's PSIR indicates that he had no previous criminal record. The trial court indicated that Cherry was "open and cooperative" with the police. The PSIR also indicates that Cherry turned himself in to police for questioning and gave a full account of the events the night of the murder. Cherry was also very cooperative with the Michigan Department of Corrections and had no disciplinary action while in jail, despite threats from Barron. The PSIR indicates that Cherry had a "fairly significant" work history, is fairly intelligent, and, although he only had a tenth-grade education, could complete a college degree and apply himself in a constructive fashion. Of the three defendants, Cherry showed the greatest amount of remorse for his actions. On the negative side, Cherry was a gang member and admitted having a marijuana problem. The trial court noted that the PSIR had positive things to say about Cherry and that, "To the extent you could have anything positive in this whole case, I guess it's been Mr. Cherry." In fact, apart from Cherry's marijuana use, the trial court did not say anything negative about Cherry during sentencing. The trial court did not give any reason, on the record or in the sentencing information report (SIR), why it departed upward from the legislative guidelines and imposed the maximum sentence for Cherry's safe-breaking conviction. "To minimize the risks of relying on misinformation, evaluate the effectiveness of the guidelines, and facilitate appellate review, the sentencing court must articulate its reasons for departing from the guidelines range both on the record at sentencing and on the sentencing information report." *Bennett, supra* at 516. Because the trial court did not articulate any reasons on the record or in the SIR for departing upward from the legislative guidelines in regard to Cherry's safe-breaking conviction, we conclude that the case should be remanded to the trial court to either: (1) articulate its reasons for departing from the guidelines range in regard to Cherry's safe-breaking conviction or (2) resentence Cherry for safe-breaking to a sentence within the guidelines range.

2. Burton's Safe-Breaking Sentence

Burton argues that he should be resentenced because the trial court failed to articulate its reasons for imposing his sentence for his safe-breaking conviction. However, Burton failed to provide this Court with a copy of his PSIR, as required by MCR 7.212(C)(7). A defendant must provide this Court with a copy of his PSIR in order to properly present a sentencing issue for appeal. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). A defendant who fails to submit to this Court a copy of his PSIR waives any review of his sentence. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). Burton has waived review of this issue by failing to provide a copy of his PSIR.

III. Conclusion

In conclusion, we: (1) vacate defendants' convictions and sentences for first-degree home invasion, (2) vacate Cherry and Barron's convictions for second-degree murder, (3) amend Burton's judgment of sentence to reflect one conviction for first-degree murder under two theories, premeditation and felony murder, and (4) remand Cherry's case to the trial court to either articulate its reasons for departing from the guidelines range in regard to Cherry's safe-breaking conviction or resentence Cherry for safe-breaking to a sentence within the guidelines range. Defendants' remaining convictions and sentences are affirmed.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra